# STATE BAR OF CALIFORNIA COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

#### DRAFT MEETING SUMMARY - OPEN SESSION

Friday, March 27, 2009 (9:15 am - 5:00 pm)

SF-State Bar Office 180 Howard Street San Francisco, CA 90105

**MEMBERS PRESENT:** Harry Sondheim (Chair); Linda Foy; JoElla Julien; Robert Kehr; Stan Lamport; Ellen Peck (by telephone); Hon. Ignazio Ruvolo; Jerry Sapiro; Mark Tuft; and Tony Voogd.

**MEMBERS NOT PRESENT:** Raul Martinez; Kurt Melchior; Dominique Snyder (leave of absence); and Paul Vapnek.

**ALSO PRESENT:** George Cardona (Office of the U.S. Attorney, C.D. California); Randall Difuntorum (State Bar Staff); Diane Karpman (Beverly Hills Bar Association Liaison) (by telephone); Mimi Lee (State Bar Staff); Diane Jackson McLean (COPRAC Liaison); Prof. Kevin Mohr (Commission Consultant) (by telephone); Donald Steedman (Office of Trial Counsel); and Mary Yen (Office of General Counsel).

# I. <u>APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE FEBRUARY 20, 2009 MEETING</u>

The open session action summary was deemed approved.

#### II. REMARKS OF CHAIR

#### A. Chair's Report

The Chair reported on his contact with Commission members regarding revised comprehensive rule assignments. The Chair indicated his desire that the lead drafter and all codrafters be present at meetings when assigned rules are discussed. The Chair reminded members to submit assignments on-time or to promptly inform staff about the status of an assignment prior to the assignment deadline. The Chair emphasized that the comprehensive assignments and the revised inventory/tentative schedule makes it possible for all drafters to begin working on anticipated assignments even where a matter may not be planned for an upcoming agenda. Commission members were also reminded to send emails early and to include the agenda item number and rule number in the subject line of each email message, and to also enumerate the issues or points made in the body of the email message.

### B. Staff's Report

Commission members provided input to staff on a draft "dashboard" cover sheet that would be a new component in the Commission's Model Rule comparison chart format.

# III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET CIRCULATED FOR PUBLIC COMMENT (BATCH 4 OR 5

### A. Consideration of Rule 1.8.2 [MR 1.8(b)] Use of Confidential Information of Current Clients

The Commission considered Draft 1.1 of proposed Rule 1.8.2 (3/16/09) presented as a redline draft showing changes to MR 1.8(b). Mr. Mohr led a discussion of open issues and the following drafting decisions were made:

- (1) A recommendation to add "confidential" to qualify "information relating to the representation" as used in the rule was considered by not adopted (1 yes, 7 no, 0 abstain 0).
- (2) There was no objection to the Chair deeming approved the addition of the phrase "of a Current Client" at the end of the rule title.
- (3) There was no objection to the Chair deeming deleted the phrase "or required" in the last line of the rule.
- (4) A recommendation to add a specific reference to the particular rules (i.e., Rules 1.6 and 3.3) rather than using the indefinite phrase "by these Rules" was considered by not adopted (2 yes, 6 no, 0 abstain 0).
- (5) In Cmt. [1], the concept of adding "whether or not confidential" after "information relating to the representation" in first line was approved (5 yes, 4 no, 0 abstain).
- (6) In Cmt. [1], the phrase ", when it is to the client's disadvantage" was added at the end of the sentence on line 15 (7 yes, 0 no, 2 abstain).
- (7) In Cmt. [1], consistent with similar deletion in the rule, the phrase "or required" was deemed deleted.
- (8) In Cmt. [1], line 24, the term "written" was added to modify "informed consent" so that the rule's requirement is "informed written consent" (6 yes, 0 no, 3 abstain).
- (9) In Cmt. [1], a recommendation to add the term "current" to qualify "client" was considered but not adopted (2 yes, 6 no, 1 abstain). It was understood that the ABA format is to assume that the use of the term "client" refers to a "current client." It was understood that a review of all of the Commission's rules would be appropriate to verify consistency. In particular, it was deemed approved to use "Current" in the titles for all of the Commission's 1.8 series rules.
- (10) In Cmt. [1], line 24, including "or the State Bar Act" was deemed approved.

(11) In Cmt. [1], line 25, regarding which rules to be cross referenced, the codrafters were asked to add rules 1.9 and 4.1 with rule 1.6 also included but in brackets.

The codrafters were asked to implement the above changes in a revised draft for submission to staff to conduct a 10-day ballot. There was no objection to the Chair deeming the proposed rule approved subject to the outstanding drafting that will be implemented in the 10-day ballot version of the rule.

# B. Consideration of Rule 3.8 Performing the Duty of Member in Government Service [Rule 5-110]

The Commission considered Draft 5.1 of proposed Rule 3.8 (1/8/09) presented in a first draft of an ABA comparison chart explaining all changes to MR 3.8. Ms. Foy led a discussion of open issues and the following drafting decisions were made:

- (1) In paragraph (d), there was no objection to the Chair deeming approved the substitution of the MR language ("and in connection with sentencing, disclose to the defense and to the tribunal") for the current language.
- (2) In response to revisions suggested by OTC staff (adding concept of "statutory Brady-like obligations" and clarifying that the harmless error doctrine does not exculpate lawyers from disciplinary violations), the Chair asked that draft language be provided within 15 days so that the codrafters have a concrete proposal to consider.
- (3) In paragraph (f), the language was changed to the ABA phrase "exercise reasonable care" in the place of the current language "make reasonable efforts" (6 yes, 3 no, 0 abstain).
- (4) In paragraph (g), there was no objection to the Chair deeming approved the substitution of the ABA language ("knows" and "an offense") for the current language ("comes to know" and "the offense"). In addition, it was understood that Mr. Cardona would provide further input to the codrafters within 15-days.
- (5) In paragraph (g), the ABA precatory language and the ABA (g)(1) & (2) language was substituted for the current language (7 yes, 0 no, 1 abstain).

The codrafters were asked to await further input from Mr. Cardona and OTC staff and then make conforming changes to the rule and comments that would be submitted to staff to conduct a 10-day ballot to approve the rule.

C.	Consideration of R	ule 1.11 Specia	I Conflicts of	Interest for	<b>Former</b>	and			
	Current Officers and Government Employees [Rule 3-310]								

Matter carried over.

# D. Consideration of Rule 1.12 Former Judge, Arbitrator, Mediator, or other Third-Party Neutral [Rule 3-310]

The Commission considered Draft 2.3 of proposed Rule 1.12 (3/17/09) presented as a redline draft showing changes to MR 1.12. Justice Ruvolo led a discussion of open issues and the following drafting decisions were made:

- (1) In paragraph (a), the codrafters were authorized to consider revisions addressing the situation where a lawyer employed as law clerk actually receives case information and then leaves the court and later seeks to appear as an attorney of record for one of the parties.
- (2) In paragraph (b), the codraftrers agreed to incorporate the concept of "law firm" so that the second line of paragraph (b) refers to a "lawyer" or "law firm."
- (3) In paragraph (d), the codrafters agreed to clarify the language concerning partisan arbitrators.
- (4) In paragraph (c), it was suggested that the codrafters consider language that would conform California case law (the Higdon case and the Cho case) so that screening is available for settlement judges.
- (5) In Cmt. [1], third sentence, the addition of language providing examples ("uncontested, procedural. . . .") was deemed approved.
- (6) In Cmt. [2], retaining the reference to "rule 1.0(e)" in brackets was deemed approved.
- (7) Considertaion of Cmt. [3] & Cmt. [4] was deferred until the language of the rule is finalized.

The Chair asked that the codrafter's next draft be in the form of an ABA comparison chart.

#### E. Consideration of Rule 1.14 Client with Diminished Capacity

The Commission considered a first draft of an ABA comparison chart for Draft 10.2 (3/13/09) of proposed Rule 1.14. Ms. Foy led a discussion of open issues and the following drafting decisions were made:

- (1) In paragraph (b), the addition of the phrase "a person who is" after the word "or" and before the word "the" was deemed approved.
- (2) In paragraph (c), the tentative substitution of the phrase "confidential information related to the representation" (in brackets) for the current phrase "confidential information and client secrets" was deemed approved.
- (3) In paragraph (c), the substitution of the phrase "diminished capacity" for the current phrase "incapacitated client" was deemed approved.
- (4) A recommendation to include the concept of requiring actions that are in the best lawful interest of the client (similar to Rule 1.13) was considered but not adopted (3 yes, 4 no, 1 abstain).
- (5) Regarding the concern that the concept of this proposed rule is different from the ABA because the ABA has an implied authority provision that is not included in California's current statutory confidentiality standard, it was understood that the codrafters would explain this difference in the explanation column of the ABA comparison chart. In addition, the codrafters were asked to note that some coordinated steps would need to be taken with both the Legislature and the Supreme Court to make the exception effective. Mr. Tuft volunteered to assist the codrafters on drafting these explanations.
- (6) In the footnoted proposed explanation of paragraph (b), the third line was revised to read: "... would be better addressed... as part of the applicable statutory scheme."
- (7) In Cmt. [1], revising the third sentence to track the start of the ABA comment ("When the client. . . ") was deemed approved. Also, it was deemed approved to replace "the Rule" with "this Rule" in the first line of Cmt. [1].
- (8) In Cmt. [4], changing "may" to "should" in last sentence was deemed approved.
- (9) In Cmt. [5], adding a citation to Evidence Code section 952 was deemed approved. In addition, reverting to the ABA language also was approved subject to the addition of the Evidence Code citation and a deletion of the phrase "protective action" (7 yes, 0 no, 2 abstain).
- (10) In Cmt. [8], the codrafters were asked to implement the suggestion to use two separate sentences: one to address a conservatorship filing when the lawyer only represents the client, and another sentence to address a filing where the lawyer represents another person who is seeking to impose the conservatorship.
- (11) In Cmt. [9], the codrafters were asked to delete the phrase "including but not limited to" and also to add "significantly" to modify "diminished capacity." In addition, the codrafters agreed to correct the typo in the first line of footnoted explanation number 13 (changing "not" to "no").

The Chair asked the codrafter's to implement all of the changes in a revised draft to be considered at the next meeting.

F.	Consideration	of	Rule	1.10	Imputation	of	Conflicts:	General	Rule	[Rule
	3-310]									

Matter carried over.

G.	<b>Consideration of Rule</b>	1.6 [MR 1.6]	Confidentiality	of Information
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Matter carried over.

#### IV. MATTERS FOR ACTION - RULES CIRCULATED FOR 10-DAY BALLOT

#### A. Consideration of Rule 1.8.6 [Rule 3-310(F)] Payments Not From Clients

The Chair announced that this rule had passed the ballot but that the issues raised by any objectors would be considered when the rule returns from public comment. It was understood that Mr. Sapiro and Mr. Kehr would implement all of the non-substantive changes identified during the ballot.

# B. Consideration of Rule 1.8.7 [3-310(D)] [ABA MR 1.8(g)] Avoiding the Representation of Adverse Interest (aggregate settlements)

The Chair announced that this rule had passed the ballot but that the issues raised by any objectors would be considered when the rule returns from public comment.

### C. Consideration of Rule 5-210 [ABA MR 3.7] Member as Witness

The Chair announced that this rule had passed the ballot but that the issues raised by any objectors would be considered when the rule returns from public comment. The objectors were asked to provide dissent language to add to the ABA comparison chart.

### D. Consideration of Rule 1-650 (Limited Legal Services Programs)

At the time of the Commission's meeting, there was no request from the Board for further assistance with this rule and the rule was not called for discussion. It was anticipated that after the close of the public comment period, the Commission would prioritize consideration of possible revisions in response to the comments received.